No. 84-1491

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*,

Appellants,

v.

MAURICE S. HEPPS, *et al.*,

Appellees.

On Appeal from the Supreme Court of Pennsylvania

REPLY BRIEF FOR APPELLANTS

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TABLE OF AUTHORITIES

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INTRODUCTORY STATEMENT

We have argued that defendants' First Amendment interest in being free from sanctions for speech not shown to be false demonstrably outweighs any interest of the state in giving a defamation plaintiff the enormous advantage of presuming, rather than proving, the key element of his case—*i.e.*, the falsity of the publication. None of plaintiffs' arguments is sufficient to justify the result they seek to have affirmed by this Court.

1. Plaintiffs rely (Br. 19-20) on dictum in a privacy case stating that it was an open question whether liability for defamation could be based on a true statement. *Cox Broad-*

casting Corp. v. Cohn, 420 U.S. 469, 490 (1975). The *Cox Broadcasting* opinion, however, while expressly declining to rule on this issue, did hold that liability in a privacy action could not be premised upon the accurate publication of information obtained from the public record. *Id.* at 491. Moreover, Justice Powell, who had written the majority opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), strongly asserted that no liability for truth was permissible after *Gertz*. 420 U.S. at 497-500.

One year after the decision in *Cox Broadcasting*, the Court stated that "demonstration that an article was true would seem to preclude finding the publisher at fault," citing Justice Powell's concurrence in *Cox Broadcasting*. *Time, Inc. v. Firestone*, 424 U.S. 448, 458 (1976). Moreover, the Court has expressly stated that private persons as well as public figures cannot recover without proof of falsity. *Herbert v. Lando*, 441 U.S. 153, 175-176 (1979).

This Court's position in criminal libel cases should now be made explicitly applicable to civil libel actions: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Indeed, the entire focus of *Gertz* was the protection of truth and what defendant reasonably believed to be truth, even to the point of depriving plaintiff of a remedy for some falsehoods. The First Amendment, which protects even some falsehood in order to promote open debate on matters of public concern, necessarily protects all speech not proven false.

2. In performing the "balancing of interests" mandated by this Court's opinions,[1] plaintiffs contend that the "penumbra" of various constitutional provisions puts a plaintiff's reputational interest on the same footing as defendant's free speech and press interests under the First and Fourteenth Amendments (Br. 27). Plaintiffs' "penumbra" argument is based on a collection of isolated sentences from various opinions which essentially state that an individual has a strong

1. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. ____, 86 L.Ed.2d 593, 601 (1985); *Gertz, supra*, 418 U.S. at 342-348.

interest, under our constitutional system, in protecting his good reputation.

Without in any way denigrating the importance of plaintiffs' reputational interests, those interests do not rise to the level of a property right protected by the Fourteenth Amendment. Plaintiffs' assertions about the constitutional weight of their interests are belied by the rulings of *Gertz* and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), upheld in numerous subsequent cases, that a plaintiff may not necessarily recover even when a defendant has injured plaintiff's reputation by false statements. The First Amendment's guarantee of the right to uninhibited and robust debate on matters of public concern has clearly been held to outweigh plaintiff's right to protect his reputation from demonstrably *false* accusations. The First Amendment right thus obviously outweighs plaintiff's reputational interest when it comes to *true* statements or statements which have not been proven false.

Whatever the relative strength of a plaintiff's reputational interest, it does not rise to a "liberty" or "property" right within the meaning of the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693, 711-712 (1976). The right to free speech and press, on the other hand, has long been recognized as such a "liberty" interest. *Near v. Minnesota*, 283 U.S. 697, 707 (1930). Indeed, freedom of speech and press are protected against abridgement by a state precisely because they are "among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

3. Although plaintiffs contend that defendants have no need for a rule requiring plaintiffs to prove falsity (Br. 32-36), the fact is there is a very real risk of self-censorship in the absence of such a rule.

Plaintiffs emphasize that, since *Gertz*, a plaintiff may not, in any event, recover without establishing fault. But that fact does not obviate the necessity of requiring a plaintiff to prove falsity. The negligence requirement[2] simply does not ade-

2. Pennsylvania has adopted negligence as its fault requirement, *Rutt*

quately protect a libel defendant's freedom of speech because negligence is so easily found by jurors and is virtually unreviewable by the appellate courts. *See* Libel Defense Resource Center (hereafter LDRC) Bulletin No. 6, 43 (1983). As one commentator warned shortly after the *Gertz* decision, the hope that a traditional negligence standard "will prevent unnecessary self-censorship is illusory":

> No one with the slightest appreciation for the myriad uncertainties of common law negligence would rely on the belief that reasonable care will preclude an adverse verdict. If the common law concept of negligence is applied to defamation, the extent of a publisher's constitutional protection will depend on a jury's relatively unfettered, ex post facto appraisal of his conduct, and since the publisher has no way of knowing how large the jury will make the prohibited zone, he has no choice but to steer wide of it.

Anderson, *Libel and Press Self-Censorship,* 53 Tex. L.R. 422, 460-461 (1975).

The prediction that common law negligence would not sufficiently protect the defendant's constitutional interest has proven true. Once a jury, by presumption or otherwise, finds against a defendant on the truth issue, it will almost automatically find the requisite negligence to hold defendant liable. "[F]alsity triggers the liability." Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal,* 18 U.S.F. L.Rev. 1,7 (1983) (footnote omitted). "After all, if the story is false, *some* further check would almost certainly have shown this—and the plaintiff seizes on the most plausible of these unmade inquiries." Franklin, *supra,* 6 Comm/Ent L.J. at 278 (emphasis in the original). Moreover, "jurors are willing to impose lia-

v. Bethlehem Globe Publishing Co., 335 Pa. Super. 163, 484 A.2d 72 (1984), as have most states which have addressed the issue. *See* Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 Comm/Ent L.J. 259, 264-265 (1984). Ordinary common law negligence is generally the test, rather than a standard relating to professional journalistic practices. *Id.* at 265-266.

bility on virtually all cases of claimed negligence." *Ibid.* (*See* Print and Broadcast Media and Organizations Amicus Curiae Br. 5-21). In short, a finding of falsity often results in a finding of negligence and the imposition of liability on the media defendant. When falsity is presumed, virtually nothing, except litigation costs, stands between the filing of a libel suit and the return of a verdict in favor of a private defamation plaintiff.

Therefore, the burden of proof on falsity is indeed crucial. As this Court has repeatedly recognized, "where the bu len of proof lies may be decisive of the outcome" of a particular case. *Speiser v. Randall,* 357 U.S. 513, 525 (1958) (citations omitted). *Accord: Lavine v. Milne,* 424 U.S. 577, 585 (1976). That is certainly true as to the burden of proof on the fundamental libel issue of falsity.

4. Plaintiffs do not dispute, but would summarily dismiss as mere "policy arguments," defendants' demonstration that it is not inequitable to require a private plaintiff to prove falsity (Br. 25 n. 12). Plaintiffs cannot so easily evade the force of such arguments, however, because the balancing test requires the Court to determine whether plaintiffs' interests are sufficient to overcome defendants' First Amendment rights. For all the reasons stated in our opening brief, the burden of persuasion on the key issue of falsity belongs with plaintiffs, in light of defendants' strong constitutional interest in freely discussing public affairs and the fairness and practicality of allocating to plaintiffs the burden of proof on falsity.

Private individuals are just as capable of carrying the burden of persuasion on falsity as are public figures.[3] A state's interest in providing more protection to private persons than to public ones (*see Gertz,* 418 U.S. at 345), is therefore fully

3. The extensive evidence plaintiffs were able to produce during the six-week trial in this case belies their argument (Br. 39-42) that they were deprived, by virtue of the Pennsylvania Shield Law, of a full and fair opportunity to try to carry the burden of proof. (*See* Appellants' Br. 10-11; 36-37). Moreover, any complaints concerning the Shield Law should be addressed in the first instance to the Pennsylvania Legislature rather than to this Court.

accommodated by permitting the state to adopt the lower fault standard.

Dropping the fault standard from actual malice to negligence gives private plaintiffs a demonstrable advantage over public figure plaintiffs. First, private persons are much more likely to succeed in resisting summary judgment. *See* LDRC Bulletin No. 6, *supra,* at 41. Second, they are much more likely to prevail than plaintiffs subject to the *New York Times* standard. Franklin, *supra,* 6 Comm/Ent L.J. at 272. As a recent LDRC study demonstrated, a plaintiff's verdict in a libel action brought by a private individual is rarely overturned on appeal solely on the ground that a finding of negligence was erroneous. LDRC Bulletin No. 6, *supra,* at 42. Comparable data in actual malice cases, on the other hand, showed that defendants were able to overturn " 'actual malice' findings in nine of fourteen cases." Franklin, *supra,* 6 Comm/Ent L.J. at 272, citing Franklin, *Suing Media for Libel: A Litigation Study,* 1981 Am. Bar Found. Res. J. 797, 824-825. The state's greater interest in protecting a private plaintiff's reputation is thus adequately served by the lower standard of fault the state may choose to require.

5. Plaintiffs are equally in error in relying (Br. 34) on win-loss statistics which show that media defendants quite often prevail on appeal. In the first place, this ignores the fact that the costs of winning a libel case are often staggering. At trial, "jurors rule against media defendants eighty-five percent of the time. This startling figure is higher than in any other tort litigation area." Franklin, *supra,* 18 U.S.F. L.Rev. at 4. Admittedly, defendants fare much better on appeal (*see* Appellees' Br. 34), but appeal by definition means that the case has been discovered and tried. Secondly and significantly, these statistics are based on a universe of cases which includes both public official/figure cases and private person cases from jurisdictions which, after *Gertz,* often have required the plaintiffs to bear the burden of proving falsity (*see* Appellants' Br. 19 & n. 9). They therefore are of little assistance in forecasting the impact of placing the burden of proving truth on defendants.

6. Plaintiffs argue strenuously (Br. 36), that the focus of most libel cases has become the fault issue rather than truth or falsity—a result which may be the natural outgrowth of the *New York Times* and *Gertz* decisions.[4] This argument equally supports our position that defendants run a real risk of being sanctioned for true speech. With the emphasis on fault rather than falsity, "it is more than theoretically possible for a plaintiff to win a libel action on the basis of a true statement . . ." A rule that the burden of proof is on defendant "and that the plaintiff need not prove falsity other than, at most, by alleging it in the complaint" contributes to the possibility of winning on the basis of a true statement, "for the rules of evidence and pleading permit an action to proceed without any substantial assessment of the actual truth or falsity of the challenged statement." Bezanson, Cranberg and Soloski, *Libel and the Press, Setting the Record Straight* 33-34, 1985 Silha Lecture, University of Minnesota (May 15, 1985).

7. Defendants have argued (Br. 32-33) that it is unconstitutional to *presume* the key element of falsity based on proof of defamatory speech because of the absence of the requisite "rational connection" between the proven and presumed fact. Plaintiffs assert (Br. 30) that the "rational connection" rule applies primarily in criminal cases. But the rule applies equally in civil cases where, as here, Fourteenth Amendment property or liberty interests are affected. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 28 (1976); *Western & Atlantic R. Co. v. Henderson,* 279 U.S. 639, 642 (1929); *Mobile, J. & K. C. R. Co. v. Turnipseed,* 219 U.S. 35, 43 (1910).[5]

Although plaintiffs attempt to rely on *Lavine v. Milne, supra,* to deflect the rational connection argument, that decision actually supports defendants' position. *Lavine* upheld a welfare statute which provided that a person who applied for

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4. See Franklin, *supra,* 1981 Am. Bar Found. Res. J. at 820.

5. Plaintiffs also rely on various civil decisions of Courts of Appeals employing or approving presumptions based on policy (Br. 30-31). As the cases cited above show, however, this Court has assessed the constitutionality of statutory presumptions under the rational connection test.

benefits shortly after quitting a job was "deemed" to have quit in order to qualify for benefits, and was therefore ineligible for relief under statutory rules. The Court upheld the provision, finding that it involved no true "presumption." 424 U.S. at 584. The Court emphasized that, unlike other cases invalidating presumptions under the rational connection test, the provision at issue in *Lavine* did not shift the burden of proof from one party to another. Rather, the provision merely made clear that a welfare applicant must prove all essential elements of his case, much as "a tort or contract plaintiff [must] prove an essential element of his case." *Ibid.*

In this case, that sensible result can only be achieved by invalidating the Pennsylvania burden of proof statute which rests on an irrational presumption that *does* shift the burden. Reversal of the decision below will require a plaintiff alleging the tort of libel to prove the essential element of falsity rather than presuming falsity from the unrelated fact of a defamatory statement. Here, the challenged statute does shift the burden of proof on an element of plaintiffs' case, unlike the statutory provision in *Lavine*.

Although plaintiffs quote the statement in *Lavine* that the locus of the burden of persuasion is "normally not an issue of federal constitutional moment" (424 U.S. at 585), that statement was made in the context of welfare benefits, to which there is no constitutional entitlement. The Court emphasized that such benefits "are not a fundamental right, and neither the State nor Federal Governments are under any sort of constitutional obligation to guarantee" such benefits. *Id.* at 585 n. 9. This case, by contrast, involves fundamental constitutional guarantees, and the burden of persuasion on the key element of the case unquestionably rises to federal constitutional import.

CONCLUSION

For the reasons stated above, and in defendants' opening brief, the judgment of the Supreme Court of Pennsylvania should be reversed, and the cause should be remanded for reinstatement of the judgment on the verdict in favor of defendants.

Respectfully submitted,

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